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August 10, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND
Mr. Greg Cook
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-98, Local Competition Proceeding
CC Docket No. 95-116, Subscriber List Information

Dear Greg:

INFONXX, Inc. (INFONXX) submits this letter to follow up on our meeting of August 3, 1999 and to provide background on the Commission's authority to afford competitive directory assistance (DA) providers access, at nondiscriminatory rates, terms and conditions, to local exchange carriers' (LECs') directory listing information under Section 251(b)(3) of the Communications Act (Act).

The encouragement of competition in the market for directory assistance services was clearly among Congress's goals when it enacted the Telecommunications Act of 1996. *See* 47 U.S.C. §§ 251(b)(3), 271(c)(2)(vii)(II). Because competitive DA providers are now playing an important role in accomplishing that goal, the Commission's decision to afford competitive DA providers nondiscriminatory access to LEC directory listings pursuant to Section 251(b)(3) is both (a) authorized pursuant to Sections 201/202 and (b) "reasonably ancillary" to the Commission's effective performance of its responsibility under the Act to encourage competition in telecommunications markets.

"Nondiscriminatory Access" To Directory Listing Information Means Access At Rates Comparable To Those Paid By Other Recipients Of Directory Listings

Section 251(b)(3) requires LECs to permit telephone exchange service and telephone toll service providers to have "nondiscriminatory access" to, among other things, "directory listings." The nondiscriminatory access requirement "encompasses both (1) nondiscrimination between and among carriers in rates, terms and conditions of access; and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC."[1] If "nondiscrimination" means anything, it prohibits a LEC from asking

[1] Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 19392, 19444 (1996) ("*Local Competition Second R&O/MO&O*").

different providers to satisfy different requirements in order to gain access to directory listing information. As the Commission made clear earlier in this proceeding, such "discriminatory treatment" would include "the imposition of disparate conditions between similarly-situated carriers on the *pricing* and ordering of services covered by Section 251(b)(3)."[2] Therefore, Section 251(b)(3) requires LECs to charge all covered entities the same rate for comparable access to directory listing information.

The rates that some providers covered under Section 251(b)(3) pay for access to directory listing information have already been established under Section 251(c)(3) interconnection agreements, based on the prices the LECs themselves pay for access to the information. Accordingly, to assure "nondiscriminatory access" for *all* parties entitled to the protections of Section 251(b)(3), the Commission should require that all such entities be afforded access to directory listing information at rates comparable to the interconnection agreement prices paid by some competing providers of DA services.

The Communications Act Provides The Commission With Ample Authority To Apply The Directory Listing Provisions of Section 251(b)(3) To Competitive Directory Assistance Providers

Many competitive DA providers offer call completion as a complement to DA services, and thus could be characterized as providers of telephone exchange or toll service. Other aspects of the DA business also may qualify competitive DA providers as telecommunications service providers. However, assuming *arguendo* that competitive DA providers like INFONXX are not providers of telephone exchange service and telephone toll service expressly entitled to nondiscriminatory access to directory listings under Section 251(b)(3), the Commission nonetheless has authority – and compelling public policy reasons – to extend the Section 251(b)(3) protections to competitive DA providers.

The Commission has already established a precedent in this proceeding of extending relevant provisions of Section 251(b)(3) to entities that are not expressly covered by its terms but that compete with covered entities and would be at a competitive disadvantage without the protections of Section 251(b)(3). In the *Local Competition Second R&O/MO&O*, the Commission relied on Section 202(a) of the Act to apply a rule prohibiting the assessment of disparate telephone number administration fees against different carriers to paging carriers, despite the fact that paging carriers are not telephone exchange or telephone toll service providers covered by Section 251(b)(3).[3] Section 202(a) prohibits common carriers from

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[2] *See id.* at 19445 (emphasis added).

[3] In adopting the substantive rule on number administration fees, the Commission was acting in part pursuant to Section 251(b)(3)'s requirement that LECs provide nondiscriminatory access to telephone numbers. *See Local Competition Second R&O/MO&O*, 11 FCC Rcd at 19537-38 ("We conclude that charging different 'code opening' fees for different providers or categories of providers of telephone exchange service constitutes discriminatory access to telephone numbers and therefore violates Section 251(b)(3)'s requirement of nondiscrimination.").

unreasonably discriminating in "charges, practices, classifications, regulations, facilities or services" or from "subject[ing] any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a). In the *Local Competition Second R&O/MO&O*, the Commission concluded that this nondiscrimination provision supported the extension of Section 251(b)(3)'s telephone number access requirement to paging carriers. The Commission reasoned that "[p]aging carriers are increasingly competing with other CMRS providers [covered by Section 251(b)(3)], and they would be at an unfair competitive disadvantage if they alone could be charged discriminatory [telephone number] activation fees."[4]

This rationale is directly applicable to competitive DA providers seeking access to directory listing information. Competitive DA providers like INFONXX are increasingly competing with local and long distance companies now providing national DA services, and they would be at an unfair competitive disadvantage if they were charged higher prices for or denied access altogether to LECs' directory listings. This would reduce overall competition in the DA market, frustrating the congressional goal of bringing competition to local telephone markets (including the DA market) traditionally controlled by monopoly LECs. Placing competitive DA providers at a competitive disadvantage to local and long distance carriers providing DA services also would harm consumers by hindering the ability of competitive DA providers to continue to bring innovations, such as free call completion and personal rolodex services, to the directory assistance market.[5]

Moreover, there should be no doubt that the Commission has jurisdiction to impose obligations on LECs with respect to the provision of directory listing information to competitive DA providers. The Supreme Court has held that the Commission's jurisdiction extends beyond its express responsibilities under the Act to those areas "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also* 47 U.S.C. § 152(a). Under this principle, the D.C. Circuit Court has held that the Commission is entitled to considerable deference in determining how to exercise its ancillary jurisdiction over services related to those expressly regulated under Title II of the Act. In *Computer & Communications Industry Association v. FCC*, the Court explained that "[i]n a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." 693 F.2d 198, 211 (D.C. Cir. 1982) (quoting *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966)). Deference to the agency is particularly appropriate where the services at issue

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[4] *Id.* at 19538.

[5] *See id.* at 19460 ("[The Commission] agree[s] with MCI that 'by requiring the exchange of directory listings, the Commission will foster competition in the directory services market and foster new and enhanced services in the voice and electronic directory services market.'").

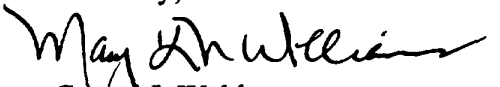
involve emerging technologies not expressly contemplated by Congress in enacting the relevant statutory provisions.[6]

In accordance with these well-established principles, the Commission has broad jurisdiction to employ the regulatory tools of Title II to foster competition in the DA services market. We urge the Commission to act expeditiously to take this important step. In doing so, the Commission may rely on the Section 251(b)(3)/Section 202 nondiscrimination requirements or, as we have argued in the *Section 222 Proceeding* (CC 96-115), the subscriber list disclosure provision in Section 222(e) of the Act.

* * * * *

Please address any questions to the undersigned.

Sincerely,



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CC Docket No. 96-98
CC Docket No. 96-115

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[6] *See Computer & Comm. Industry Ass'n*, 693 F.2d at 213-14 ("In *Computer II* the Commission took full advantage of its broad powers to serve the public interest be accommodating a new development in the communications industry, the confluence of communications and data processing. Because the Commission's judgment on how the public interest is best served is entitled to substantial judicial deference, the Commission's choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious. Our review of the Commission's decision convinces us that the Commission acted reasonably in defining its jurisdiction over enhanced services and [customer premises equipment].") (internal quotation and citation omitted).